BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FLOYD C. WIMS, JR. Claimant VS. **GOODYEAR TIRE & RUBBER CO.** Respondent AND **TRAVELERS INSURANCE CO.** Insurance Carrier **WORKERS COMPENSATION FUND**	)	Docket No. 240,415

ORDER

The Workers Compensation Fund (Fund) requested review of the July 20, 2004 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on November 9, 2004.

APPEARANCES

Patrick M. Salsbury, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent). Jeff K. Cooper, of Topeka, Kansas, appeared for the Fund. The claimant did not appear as he has resolved his issues in this claim.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The sole issue to be determined is the Fund's liability to reimburse respondent the benefits paid to claimant for his work-related accident that occurred on March 16, 1993 as provided under K.S.A. 44-567. The ALJ concluded claimant "was a handicapped worker who was retained in employment by the [r]espondent with knowledge he was

handicapped."[1] Accordingly, the Fund was ordered to reimburse respondent $95,057.81, the total sum it paid to claimant as a result of his work-related accident.

The Fund appeals the ALJ's decision and alleges respondent failed to meet its evidentiary burdens. Specifically, the Fund contends the evidence fails to establish that claimant was a "handicapped" employee within the meaning of the Act because of his bilateral knee arthritic condition, and that respondent knew of this fact before his March 16, 1993 accident. The Fund concedes there is no dispute that claimant's injury and resulting disability would not have occurred but for his preexisting bilateral knee condition.

Respondent argues that there are no less than 12 medical and/or accident reports within its medical files relating to claimant's arthropathy dating back to 1982, and as late as 1990. Respondent contends these documents establish knowledge of claimant's "handicap" thus satisfying the statutory requirements. Accordingly, respondent requests the ALJ's Award be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The underlying facts surrounding claimant's accident are not in dispute. Claimant suffered compensable bilateral knee injuries arising out of and in the course of his employment with respondent on March 16, 1993 when he tripped, fell to the floor, and landed on both knees. At the time of the accident, claimant was 48 years old and had worked for respondent approximately 26 years.

Following this accident, claimant was treated by Dr. Phillip L. Baker and Dr. Joseph E. Mumford. Dr. Baker diagnosed claimant with severe bilateral osteoarthritis, greater on the left than the right. On December 3, 1997, Dr. Mumford performed a bilateral knee replacement.

On December 22, 1998, claimant settled his claim against respondent and accepted a total sum of $95,057.81. The Fund was a party to the claim and was aware of the settlement. Accordingly, the liability between respondent and the Fund remained undetermined until the matter was presented to the ALJ.

Karen Anderson, a case manager for the respondent's insurer from 1985 to 2000, was the individual charged with the job of handling claimant's workers compensation claim. She concluded claimant's March 16, 1993 accident was compensable and ultimately

[1] ALJ Award (July 20, 2004) at 3.

authorized the settlement. Ms. Anderson testified she was unaware of any restrictions placed upon claimant prior to the 1993 accident. She confirmed that there were no Form 88s[2] on file relating to claimant's knees, although there was such a document filed by respondent on November 21, 1979, specifically referencing a "musculo-ligamentous injury to [the] lumbosacral spine resulting in a 10% general bodily disability."[3]

Cynthia Nace, the workers compensation manager for respondent, also testified in this matter. She has been in her present position since October 1998, but she has custody of the medical and accident records pertaining to claimant. These documents show that over the years various reports were tendered to respondent, through the plant nurse. Ms. Nace testified that it would have been her predecessor's job to have had access to and review these records, although she cannot say whether that was done in this instance.

The records include a release for claimant to return to work dated March 28, 1986 with a diagnosis of medial collateral ligament sprain to the left knee.[4] There is a later reference in April 1996 that claimant should avoid any undue stress to the left knee and "try to baby it as much as possible" as he is far too young to be considered a candidate for a total knee arthroplasty.[5]

The first report that references bilateral arthropathy comes on Sepetember 25, 1990 and was received by respondent on September 26, 1990. Restrictions were specifically imposed shortly thereafter and as of October 26, 1990, respondent was advised that claimant had had surgery to his left knee back in 1960.[6]

The only physician to testify was Dr. Phillip L. Baker, who is a board certified orthopaedic surgeon. He concluded by claimant's own history, that claimant had "severe osteoarthritis of both knees before and at the time of his injury in 1993."[7] Going on, he stated "[t]he magnitude of the injury occurring during the course of this [March 16, 1993]

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[2] A form 88 is the document that an employer can complete and file with the Division of Workers Compensation that can presumptively establish knowledge of a handicap and "the existence of a reservation in the mind of the employer when deciding whether to hire or retain" such handicapped employee. K.S.A. 44-567(c).

[3] ALJ Award (July 20, 2004) at 5; (Form 88 filed with the Division on November 21, 1979).

[4] Nace Depo. at 13, Ex. 6.

[5] *Id.,* Ex. 7

[6] *Id.* at 33, Ex. 11.

[7] Baker Depo., Ex. 1 at 2.

tripping accident with a fall to both knees would not have occurred but for the pre-existing severe osteoarthritis of both knees."[8]

Under the law existing at the time of claimant's accident and under certain circumstances, an employer could be relieved of liability for a work-related injury to its employee. K.S.A. 1992 Supp. 44-567 read in relevant part:

> (a) An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows:
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> (1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund.
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> (2) Subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workers' compensation fund.
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> (b) In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto. If the employer, prior to the occurrence of a subsequent injury to a handicapped employee, files with the director a notice of the employment or retention of such employee, together with a description of the handicap claimed, such notice and description of handicap shall create a presumption that the employer had knowledge of the preexisting impairment. If the employer files a written notice of an employee's preexisting impairment with the director in a form approved by the director therefor, such notice establishes the existence of a reservation in the mind of the employer when deciding whether to hire or retain the employee.

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[8] *Id.*

The obvious purpose of this statutory scheme was to encourage the employment of handicapped persons as a result of specific impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees.[9] The statutory provisions regarding the Fund were to be liberally construed to carry out the legislative intent of encouraging employment of handicapped employees.[10]

K.S.A. 1991 Supp. 44-566(b) defines a "handicapped employee" as follows:

> (b) 'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:
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> 4. Arthritis;
> . . .
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> 16. Any physical deformity or abnormality;
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> 17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment.

Under K.S.A. 1992 Supp. 44-567(b)(c), the respondent has the burden of proof that it "knowingly" retained a "handicapped employee." The determination of whether an employer's knowledge was sufficient to constitute a knowledge of a handicap is made on a case-by-case basis. It is not necessary that the employer's knowledge be of a particular and medically specific injury, rather "the requisite knowledge is knowledge of handicap causing functional limitation".[11]

The ALJ concluded the records contained within respondent's dispensary records established the requisite knowledge on the part of respondent of claimant's handicapped status and ordered the Fund to reimburse respondent the entire amount of the Award paid to claimant.

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[9] *Blevins v. Buildex, Inc.*, 219 Kan. 485, 548 P.2d 765 (1976).

[10] *Morgan v. Inter-Collegiate Press*, 4 Kan. App. 2d 319, 606 P.2d 479 (1980).

[11] *Denton v. Sunflower Electric Co-op*, 12 Kan. App. 2d 262, 740 P.2d 98 (1987), *Aff'd* 242 Kan. 430, 748 P.2d 420 (1988)

The Board has considered the parties' briefs and oral arguments and finds the ALJ's ultimate conclusion should be affirmed. Like the ALJ, the Board finds that the medical records contained within respondent's own records establish respondent had knowledge of claimant's left knee problems and that those problems constitute a "handicap" under the Act. The records specifically reference restrictions as of March 1996 directing claimant to "baby" his left knee as much as possible. Although that same medical record concludes claimant is far too young to consider a total knee replacement, the clear implication of that record and those that follow, certainly give rise to a reasonable belief that claimant could well require such a drastic procedure. Indeed, that is precisely what occurred in 1997. Because this information is contained within respondent's own business records, respondent is deemed to have knowledge of their contents.[12] Respondent has sufficiently established knowledge of claimant's "handicapped" status and therefore, the ALJ's Award is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce Benedict dated July 20, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Fund
Patrick M. Salsbury, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[12] *Hearn v. Central Kansas Medical Center*, No. 163,347, 1994 WL 749172 (Kan. WCAB January 28, 1994).